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No. 06-52

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In The

Supreme Court Of The United States

MICHAEL SKAKEL,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF CONNECTICUT CRIMINAL DEFENSE LAYWERS ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The organization submitting this brief is the Connecticut Criminal Defense Lawyers Association (CCDLA), P.O. Box 1766, Waterbury, CT 06721-1766.

CCDLA is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association Of Criminal Defense Lawyers, CCDLA works to improve the criminal justice system by, inter alia, insuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally and that those rights are not diminished. CCDLA has a strong interest in this case because the Connecticut Supreme Court, in reversing two of its prior decisions, violated due process as expressed in Stogner v. California, 539 U.S. 607 (2003), Rogers v. Tennessee, 532 U.S. 451 (2001) and Bouie v. City of Columbia, 378 U.S. 347 (1964).

CCDLA seeks amicus curiae status because the question of law is a question of great public importance. As framed by the petitioner, that question is: "*whether a State violates the Due Process Clause of the Fourteenth Amendment when its highest court unexpectedly overrules its own binding interpretation of one of its statutes in order to authorize a criminal prosecution that the passage of time had*

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[1] Amicus curiae files this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amicus Curiae, their members, or their counsel made a monetary contribution for the preparation or submission of this brief to the United States Supreme Court.

previously barred." (Petitioner's Pet. p. i.)

STATEMENT OF FACTS

The Connecticut Supreme Court succinctly summarized the facts of the underlying 1975 crime and the eventual prosecution of the petitioner 25 years later.

> "On October 31, 1975, fifteen year old Martha Moxley was found bludgeoned to death in a wooded area on the grounds near her family home in Greenwich. No one was charged in connection with her murder until twenty-five years later, when the defendant, Michael Skakel, a fifteen year old neighbor of the victim at the time of her death, was arrested and charged with the crime. The case initially was brought in the Superior Court for Juvenile Matters and, thereafter, transferred to the regular criminal docket of the Superior Court. Thereafter, the case was tried to a jury, which found him guilty of murder in violation of General Statutes (Rev. to 1975) §53a-54a(a). The trial court rendered judgment in accordance with the jury verdict, from which the defendant appealed." State v. Skakel, 276 Conn. 633 at 639 (2006).

On January 24, 2006, the Connecticut Supreme Court affirmed the petitioner's conviction. Id.

One of the issues on appeal was whether the trial court "improperly concluded that his prosecution for murder was not barred by the applicable statute of limitations." (Id. at 663.)

That statute was Connecticut General Statute §54-193.[2] The Connecticut Supreme Court noted that the trial court, referring to State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983)

> "recognized that, in Paradise, we ultimately had determined, *on facts materially identical to the facts of the present case*, that the prosecution of the defendants for murder in that case was barred by the five year limitation period of the pre-1976 amendment version of §54-193, the same version of §54-193 that was in effect at the time of the murder of the victim in the present case." (Skakel at 664, emphasis added.)

The trial court had held that the five year statute of limitations period described in C.G.S. §54-193 "was inapplicable to the crime of murder." (Skakel at 665.) The Connecticut Supreme Court instead relied on Public Act 76-35 §1 which amended C.G.S. §54-193. That amendment stated in relevant part that "[t]here shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony." (Skakel at 668, citing P.A. 76-35 §1.)

The Connecticut Supreme Court reversed its decisions in State v. Paradise, 189 Conn. 346 (1983) and State v. Crowell,

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[2] C.G.S. (Rev. to 1975) §54-193 states in relevant part: "No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed."

228 Conn. 393 (1994), holding

> "Because there is no indication that the legislature intended that P.A. 76-35, §1, was to have prospective effect only, that amendment, contrary to our conclusion in Paradise, applies retroactively to crimes that were committed before its effective date but for which the preamendment limitation period had not yet expired. Consequently, P.A. 76-35, §1, applies to the October, 1975 murder of the victim." Id. at 693.

The petitioner filed a motion for reconsideration and reargument. In that motion the petitioner represented that:

> "The Court's determination that this prosecution was not time-barred by the applicable statute of limitations is based upon an analysis different than that of the trial court. Skakel, 276 Conn. at 663. The trial court concluded that the instant murder prosecution was not subject to the statute of limitations set forth in Section 54-193 (Rev. to 1975) because murder historically was considered a grave offense to which the statute of limitations was never intended to apply. The retroactive application of the 1976 amendment to the statute of limitations was *never* argued or presented by the State to the trial court. In fact, in its Memorandum In Opposition To Motion To Dismiss filed on May 30, 2001, the State conceded that it could *not* rely on a claim for retroactive application of the 1976 amendment, and it *never* argued that Paradise should be

> reversed. See State's Memorandum In Opposition To Motion To Dismiss, Appendix at A1.
>
> Thus, Mr. Skakel's brief-in-chief to this Court solely addressed the trial court's analysis and argued that the trial court misread this court's established precedent, and disregarded the historical difference between capital murder (murder in the first degree, which was never time-barred) and non-capital murder (murder in the second degree, which was time-barred). For sixteen pages, the State's brief to this Court also focused on the trial court's finding that there never was a statute of limitations for murder. Then, in one page at the end of its argument, the State alternatively requested this Court to overrule Paradise. See State's Brief, at 11-27.... Mr. Skakel responded to the State's new claim in three-quarters of a page of his 25-page reply brief. Although this Court then overruled long-standing precedent and issued a lengthy opinion addressing the retroactivity of the 1976 amendment, it did so without the benefit of either party's analysis on the issue." (Petitioner's Motion For Reconsideration And Reargument dated February 14, 2006, fn1, pp. 3–4, emphasis in the original.)

The Connecticut Supreme Court denied the petitioner's motion.

The amicus curiae otherwise relies on and adopts the statement of facts articulated by the petitioner in his petition.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted because the Connecticut Supreme Court did not apply the holding of Bouie v. City of Columbia, 378 U.S. 347 (1964). Bouie held that if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it must not be applied retroactively. Id. at 354. The retroactive application of Public Act 76-35 §1 to enable the prosecution of the petitioner is unexpected and indefensible. It conflicts with this Court's decision in Rogers v. Tennessee, 532 U.S. 451 (2001). It also violates the principle of legality and the fair warning doctrine.

ARGUMENT

This Court stated in Bouie v. City of Columbia, 378 U.S. 347 at 354 (1964) that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." Such an enlargement is thus forbidden. In 1983 in State v. Paradise, the Connecticut Supreme Court held that C.G.S. §54-193 was penal in nature and therefore had to be strictly construed. Paradise, supra, 189 Conn. at 352, 456 A.2d 305. Thus this statute could not be applied retroactively. Id. at 352. In the instant case, the Connecticut Supreme Court observed that, "because criminal statutes of limitation do not define criminal conduct, establish the punishment to be imposed or otherwise burden defendants, such statutes are not truly penal at all." Id. at 676. Hence, "[c]ontrary to our determination in Paradise, §54-193, like other criminal statutes of limitation, is *remedial* in nature." Id. at 677. Citing Toussie v. United States, 397 U.S. 112, 114-15 (1970) it was stated that "because of the remedial nature of criminal statutes of limitation they 'are to be liberally

interpreted in favor of repose.'" Skakel at 677 citing Toussie, supra at 115. The Supreme Court of Connecticut then noted that "in Paradise, the rule of strict construction provided the sole basis for our determination that P.A. 76-35, §1, has prospective effect only." Id. at 679. The Connecticut Supreme Court then overruled Paradise.

In the instant matter, instead of affording P.A. 76-35 §1 a strict and therefore prospective construction, the exact opposite construction was applied:

> "We conclude, therefore, that an amendment to a criminal statute of limitations applies to a crime committed prior to the enactment of the amendment, in the absence of a clear expression of legislative intent to the contrary, as long as the preamendment limitation period had not yet expired when the amendment became effective. Because there is no indication that the legislature intended that P.A. 76-35, §1, was to have prospective effect only, that amendment, contrary to our conclusion in Paradise, applies retroactively to crimes that were committed before its effective date but for which the preamendment limitation period had not yet expired. Consequently, P.A. 76-35, §1, applies to the October, 1975 murder of the victim." Skakel at 693.

Supreme Court precedent teaches that criminal statutes of limitations are to be liberally interpreted in favor of the accused. Toussie v. United States, supra, 397 U.S. 112 (1970) stands for this, notwithstanding Connecticut's interpretation of this decision. Generally applied, statutes must be construed to

only have a prospective effect, unless a state legislature, by express terms of the statute, indicates that a statute is to apply retroactively. Hassett v. Welch, 303 U.S. 303 (1938). In Goshen v. Stonington, 4 Conn. 209 at 223 (1822), the Connecticut Supreme Court of Errors stated that "a statute is not to be construed as having a retrospect.... Such a construction ought never to be given, unless the expression of the law imperiously requires it." Id. In more modern times, the Connecticut Supreme Court has held that a statute that changes existing law cannot be applied retroactively unless it is clearly so intended by the legislature. State v. Magnano, 204 Conn. 259, 278 (1987). Indeed, regarding both civil and criminal statutes, the Connecticut Supreme Court noted in State v. Lizotte, 200 Conn. 734, 740-41 (1986):

> "While we have noted the continued vitality and utility of the principle that procedural statutes will be applied retroactively absent contrary legislative intent; State v. Paradise, 189 Conn. 346, 351, 456 A.2d 305 (1983); we consistently have expressed reluctance to construe statutes retroactively where the statutes affect substantial changes in the law, unless the legislative intent clearly and unequivocally appears otherwise. State v. Paradise, supra, 350-51; Hunter v. Hunter, 177 Conn. 327, 331, 416 A.2d 1201 (1979); American Masons' Supply Co. v. F.W. Brown Co., 174 Conn. 219, 222-23, 384 A.2d 378 (1978); East Village Associates, Inc. v. Monroe, 173 Conn. 328, 332, 377 A.2d 1092 (1977); State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 648, 68 A.2d 289 (1949)." Id.

For many decades, Connecticut has had a statute that

specifically prohibits retroactivity relative to "any new obligation." It is Connecticut General Statute §55-3.[3] It was noted in Anderson Consulting v. Gavin, 255 Conn. 498 at 517 (2001) that the Connecticut Supreme Court had

> "uniformly interpreted §55-3 as a rule of *presumed* legislative intent that statutes affecting *substantive* rights shall apply prospectively only. Coley v. Camden Associates, Inc., 243 Conn. 311, 316, 702 A.2d 1180 (1997). This presumption in favor of prospective applicability, however, may be rebutted when the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively." Id.

Public Act 76-35 §1 speaks for itself and there is no expressed language intending retroactivity. In Skakel, the Connecticut Supreme Court did more than overrule State v. Paradise, 189 Conn. 346 (1983) and State v. Crowell, 228 Conn. 393 (1994) which were directly on point. It essentially employed a statutory construction at odds with 200 years of state precedent.[4]

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[3]C.G.S. §55-3 states: "Limitation of effect of certain acts. No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." Id.

[4] This is not ameliorated by declaring in 2006 that the statute was procedural and not substantive. This specific question was not addressed in Paradise because there was no need to reach it. The fact that the statute had no "language clearly necessitating" a retrospective construction controlled. Id. at 353. It was noted that the application of the general civil doctrine that procedural statutes "will be applied retrospectively absent a contrary legislative intent" "in the criminal realm is limited.

Such a retroactive construction is in conflict with Bouie and with Rogers v. Tennessee, 532 U.S. 451 (2001) and violates the petitioner's due process rights. As is well known, in 1964 this Court held in Bouie that ex post facto limitations operate through the Due Process Clause to judicial interpretation of criminal statutes. "If a state legislature is barred by the Ex Post Facto Clause from passing [an ex post facto] law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U.S. 347 at 353-54. In 2001, this Court expanded this constitutional principle to judge-made constructions of a state's common law rules of criminal law in Rogers, supra. The constitutional test of a Due Process Clause violation, as the petitioner correctly notes:

> "is whether it construes the law in a manner that is '"unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]"' Bouie, 378 U.S. at 354. This formulation provides courts with the needed flexibility to ensure that the law may evolve, *see* Rogers, 532 U.S. at 462, while at the same time ensuring fundamental fairness, including the requirement that the prosecution and punishment of particular conduct be foreseeable. *See* Rogers, 532 U.S. at 461-62; Marks, 430 U.S. at 191-92; Bouie, 378 U.S. at 354. A judicial ruling that is unexpected and indefensible by reference to the status quo ante deprives a defendant of those protections. Bouie, 378 U.S. at 354." (Pet. p. 15.)

Indeed, the law in Connecticut has long been to the contrary." Id. at 351.

After the Tennessee Supreme Court retroactively changed its common law "year and a day" rule in order to sustain Rogers' murder conviction, this Court affirmed the decision on grounds that doing so was predictable, i.e. not unexpected and indefensible. The majority opinion declared that employing ex post facto protections to Rogers would "unduly impair the incremental and reasonable development of precedent" (Id. at 452) and that a fair warning analysis applied. In short, because so many other states' jurisdictions had previously abolished this common law rule it was held that Rogers had been fairly warned.

The petitioner rightfully points out that the Connecticut Supreme Court's decision "was anything but a 'routine exercise of common law decisionmaking' that brought the law into conformity with reason and common sense." (Pet. p. 23.) Skakel involves turning 23 years of Connecticut Supreme Court precedent on its head, to the detriment of the petitioner. In Rogers, Bouie was distinguished because Bouie dealt with the "meaning of the words of a particular statute" rather than the "continuing viability of a common law rule." Rogers, 532 U.S. at 464. Thus Rogers does not have to be overruled for the petitioner to obtain relief from this Court. Bouie involved the meaning of a criminal statute and the instant matter involves the meaning of the Connecticut criminal statute. Accordingly, Bouie has more applicability than Rogers.[5]

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[5] One scholar has opined that in Rogers,

"the Court failed on two levels: first, it failed to convincingly circumnavigate the Bouie precedent, and second, it failed to provide a convincing rationale for the holding of the case. The opinion has initially escaped notice, but the potential ramifications of the decision are staggering, considering the volume of law many people assume is constitutional or legislative that is in fact judge made law." Ex Post Facto

Amicus curiae directs the Court's attention to the principle of legality.

> "The principle of legality, which encompasses the maxims *nullum crimen sine lege* and *nulla poena sine lege*, requires that 'no one may be convicted of or punished for an offense unless the conduct constituting the offense has been authoritatively defined by an institution having the duly allocated competence to do so.'"[6]

The principle of legality, as a term of art, means that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal."[7] And, "[i]mplicit in this principle is a prohibition against the retroactive application of criminal laws." Id. Professor Packer notes that the above-quoted Latin maxims "have a constitutional counterpart," namely, "the explicit prohibition of Article I, section 9, clause 3, that no Bill of Attainder or ex post facto Law shall be passed."[8] It is submitted that although the

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Excepted: Rogers v. Tennessee And The Permissible Retroactive Application Of Judge Made Law, 71 U. Cin. L. Rev. 1141 at 1165 (Spring, 2003).

Regardless if this is so, Rogers does not deprive the petitioner from constitutional relief.

[6] Herbert L. Packer, The Limits of the Criminal Sanction, p. 72 (1968), cited in fn10, The Supreme Court – Leading Cases, 115 Harvard L.R. (2001).

[7] Rogers v. Tennessee: An Assault on Legality and Due Process, 81 N.C. L.Rev. 317 at 321-22 (Dec., 2002).

[8] Packer, loc cit, p. 72.

principle of legality embraces and includes the "explicit prohibition" that Article I, Section 9, clause 3 and Article I, section 10 address, it embodies broader and older judicial doctrines as well, fair warning and stare decisis.[9]

This Court in Bouie recognized that

> "[t]here can be no doubt that a definition of the right of fair warning can result not only from vague statutory language but *also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language*." 378 U.S. at 352 (emphasis added).

Certainly the Connecticut Supreme Court overruling its own precedent in Skakel was unforeseeable and constitutes "retroactive judicial expansion" of a statute that the state's highest court had expressly held could not be applied retroactively.

This Court in United States v. Lanier, 520 U.S. 259 (1997) further explained that due process prevents courts from imposing a novel construction of a criminal statute "to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." Id., 266. Such a rationale illustrates the essence of the fair warning requirement. Apart

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[9] The maxims are also quoted together as one maxim, "*nullum crimen sine lege, nulla poena sine lege*." Professor Jerome Hall translated this as, "no crime without law, no punishment without law." *Nulla Poena Sine Lege*, 47 Yale L.J. 165 (1937). One commentator observes: "known as the principle of legality, this maxim 'has for centuries been the basic *sine qua non* of criminal justice.'" Fair Warning And The Retroactive Judicial Expansions of Federal Criminal Statutes, 745 Cal. L.R. 455 at 462 (2001).

from ex post facto considerations, relative to the doctrine of fair warning, the petitioner received no warning at all, much less fair warning. In the treatise Substantive Criminal Law §2.4(c) (2d ed. 2003), Professor LaFave addresses the ramifications of precedent being overruled.

> "Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision, which, if applied to the defendant's case, would result in his acquittal...." (Id.)

In such situations, the overruling decision cannot be applied retroactively. Id. This is basically what happened to the petitioner. Returning to ex post facto law, such overruling of prior precedent has been labeled "the most severe kind of 'unexpected and undefensible' change in the law." 115 Harvard L.R. 306, n.65 (2001).

In Lanier, this Court recognized three manifestations of the fair warning doctrine relative to judicial retroactivity. They are the void-for-vagueness doctrine, the rule of lenity, and what commentator Trevor Morrison calls the "rule of nonretroactivity".[10] He notes that "this rule of nonretroactivity" "provides that once a court has decided to interpret a statute a certain way, the court may not apply that interpretation retroactively if the text of the statute, *or prior constructions of it, did not fairly disclose the possibility that the statute could be*

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[10] Fair Warning And The Retroactive Judicial Expansions of Federal Criminal Statutes, 745 Cal. L.R. 455 at 469 (2001).

read that way."[11]

The principle of legality and the fair warning doctrine embodied in it and manifested in Lanier, require that this Court grant the extraordinary relief the petitioner requests.

It is important to note that Stogner v. California, 539 U.S. 607 (2003) and the Ex Post Facto Clause have independent significance to the petitioner's cause. In Stogner, certiorari was granted to answer the question of whether a California statute which revived a criminal prosecution previously time-barred by a prior statute, violated the Ex Post Facto Clause. In holding that the statute did violate the Ex Post Facto Clause, it was determined that the subject statute fell within the second of four "categorical descriptions of *ex post facto* laws." Id. at 607. The landmark case of Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) and Justice Chase's four categories of ex post facto laws were referred to. It was held that the "second Calder category" which proscribes "every law that aggravates a crime, or makes it greater than it was when committed" controlled. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). Three reasons were expressed supporting this holding. First, quoting Carmell v. Texas, 529 U.S. 513, 533 (2000), "the government has refused 'to play by its own rules.'" Stogner, 539 U.S. at 611. Thus, Stogner did not receive "fair warning." Id. at 611. Second, under Justice Chase's "alternative description" of ex post facto laws, i.e. "[a]t other times they inflicted punishments, where the party was not, by law, liable to any punishment" – covered Stogner's situation because before the statutory change he was not "liable to any punishment." Id. at 613. Third, it was held that there is a "well settled" view that the Clause prevents law allowing the revival

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[11] Id. at 469 (emphasis added).

of time-barred prosecutions. Id. at 607.

The petitioner's situation is different from that in Stogner because in Stogner, the original statute of limitations had expired years before the legislature enacted the statute that Stogner was prosecuted under and in the case at bar, the 1976 public act was enacted within the 5 year limitation period of the 1975 statute. However, in Stogner there was not a prior state supreme court decision directly on point, declaring that the new statute did not and could not be applied retroactively to the date of the crime. Thus, the rationale of Stogner should nevertheless apply to the petitioner's case.

This Court's decision in Stogner has been praised by constitutional scholars:

> "The Court's recent decisions in Carmell and Stogner appear to signal a new determination that the judiciary seek to ensure that the government play 'by its rules' in the criminal justice arena, despite the compelling social and political reasons favoring retroactive application of criminal laws. In so doing, the Court, albeit in both cases by a five-to-four vote with distinctly different majorities, heeded its own critically important admonition that the applicability of a particular constitutional provision should turn on the 'reasons' it was included in the Constitution and 'the evils it was designed to eliminate.'"[12]

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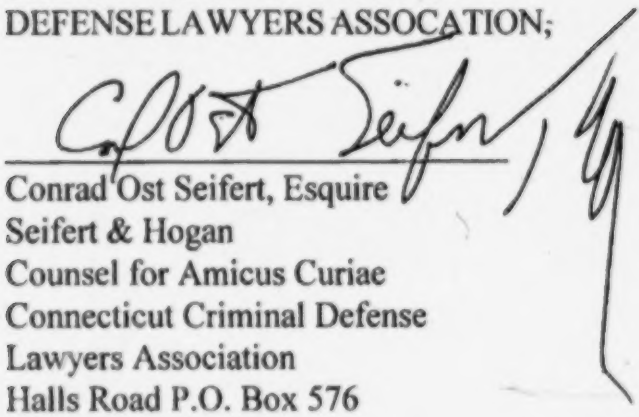
[12] "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis Of Ex Post Facto Claims In State Courts, 12 Wm. & Mary Bill of Rts. J. 439 at 508 (February, 2004).

CONCLUSION

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." Lynce v. Mathis, 519 U.S. 433, 439 (1997). When the Connecticut Supreme Court decided State v. Paradise in 1983 and upheld Paradise, supra, in State v. Crowell in 1994, it had full awareness of the importance of this "essential thread." Indeed, in the concluding sentences of State v. Paradise the justices recognized that there would be "far reaching ramifications" which would "directly affect a number of unsolved class A felonies." Id. at 353. Yet, the court did not break this essential constitutional thread. It was recently noted in Hamdan v. Rumsfeld, 126 S. Ct. 2749, fn34 (2006) that, "[w]hile the common law necessarily is 'evolutionary in nature'... an act does not become a crime without its foundations having been firmly established in precedent.... This is so because the law-making function of the courts must remain within reasonable limits.". Id. In overruling State v. Paradise and State v. Crowell and in applying the new rule of law retroactively, the Connecticut Supreme Court exceeded reasonable constitutional limits, broke the essential constitutional thread and deprived the petitioner of fair warning. Certiorari should be ordered granted not only to correct the constitutional rights violation the petitioner has endured but also to set the fair warning doctrine back on its appropriate historical course.

RESPECTFULLY SUBMITTED:
THE CONNECTICUT CRIMINAL
DEFENSE LAWYERS ASSOCATION;



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